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In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1377

JESSIE JOHNSON and CYNTHIA HALL,
PETITIONERS,

v.

STATE OF NEW YORK,
RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE DIVISION OF THE SUPREME COURT OF THE STATE OF NEW YORK, SECOND JUDICIAL DEPARTMENT

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Petitioners pray that a Writ of Certiorari issue to review the judgments of the Appellate Division of the Supreme Court of the State of New York, Second Judicial Department.

Citation to Opinions Below

The judgments against the Petitioners were affirmed by Order of the Appellate Division of the Supreme Court of the State of New York, Second Judicial Department without opinion and by Order of the court which is set forth

in our Appendix, p. 24. The State of New York Court of Appeals denied leave to appeal on February 4, 1975. The certificates denying leave to appeal are set out in our Appendix, pp. 25-26.

Jurisdiction

Jurisdiction of this Court is invoked under 28 U.S.C. 1257 (3).

Questions Presented

1. Whether the Petitioners were deprived of a fair trial by the prejudicial conduct and constant interference of the trial court, thereby denying the Petitioners due process of law.

2. Whether the Petitioners were denied due process of law and their right of confrontation by the trial court's allowance into evidence of out-of-court statements highly prejudicial to the Petitioners and erroneously limited to the "state of mind of the police" on a defense of entrapment.

3. Whether New York law which shifts the burden of persuasion on the issue of entrapment to the criminal defendant violates due process of law.

4. Whether the Petitioner Hall was denied due process of law by reason of having been tried jointly with the Petitioner Johnson who raised a defense of entrapment.

5. Whether the trial court violated Petitioner Hall's Fifth Amendment privilege not to testify and due process of law as to both Petitioners by permitting the Petitioner Hall to be confronted on cross-examination with evidence which the court had previously ruled to be irrelevant and highly prejudicial.

Constitutional Provisions and Statutes

Fourteenth Amendment

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

New York Penal Law §25.00

Defenses; burden of proof

1. When a "defense," other than an "affirmative defense," defined by statute is raised at a trial, the people have the burden of disproving such defense beyond a reasonable doubt.

2. When a defense declared by statute to be an "affirmative defense" is raised at a trial, the defendant has the burden of establishing such defense by a preponderance of the evidence.

New York Penal Law §35.40

Entrapment

In any prosecution for an offense, it is an affirmative defense that the defendant engaged in the proscribed conduct because he was induced or encouraged to do so by a public servant, or by a person acting in cooperation with

a public servant, seeking to obtain evidence against him for purpose of criminal prosecution, and when the methods used to obtain such evidence were such as to create a substantial risk that the offense would be committed by a person not otherwise disposed to commit it. Inducement or encouragement to commit an offense means active inducement or encouragement. Conduct merely affording a person an opportunity to commit an offense does not constitute entrapment.

Statement of the Case

The Petitioners were indicted in separate indictments by the Grand Jury of the County of Kings and were tried before a Judge and a jury in the Supreme Court of the State of New York, County of Kings. On October 16, 1973, judgments of conviction were entered against both Petitioners convicting each of the crimes charged in the first two counts of each of their indictments: (1) Criminal Possession of a Dangerous Drug in the First Degree, and (2) Criminally Selling a Dangerous Drug in the First Degree.

The Petitioner Johnson was sentenced to a prison term of twenty-five years to life on each count, to be served concurrently. The Petitioner Hall was sentenced to fifteen years to life on each count, to be served concurrently. Timely notice of appeal was filed by both Petitioners, and on October 15, 1974, the Appellate Division of the Supreme Court of the State of New York, Second Judicial Department, affirmed the judgments. (App. p. 24)

Petitioners made timely application to the State of New York Court of Appeals which, on February 4, 1975, denied permission to appeal. (App. pp. 25-26)

Statement of the Facts

Richard Brown, a detective assigned to the Special Division of the Narcotics Bureau of the City of New York Police Department assumed the role of an undercover agent utilizing the fictitious name of "Grady". (Tr. 823)* In approximately July of 1972, Grady met a confidential informant, one Julius Knight, against whom various criminal charges had been pending but which were disposed of in return for his cooperation as an informant. (Tr. 801) A "cover story" was developed between Grady and Knight to the effect that Grady was a narcotics dealer from Washington, D.C. seeking to make substantial purchases of narcotics. (Tr. 823-828) Knight brought Grady into the Bedford-Stuyvesant area, explaining to the "street people" of the community the details of said cover story. (Tr. 844-845) Two months elapsed without any contact between Grady and/or Knight and the Petitioner Johnson, (Johnson). (Tr. 849)

By February of 1973, despite the intense efforts of both Brown and Knight, no event of an incriminating nature had taken place involving Johnson (Tr. 871-872) Finally, on February 21, 1973, some seven months after Brown and Knight commenced their activities, they appeared at Johnson's residence located at 2027 Linden Boulevard, Queens, New York. (Tr. 874) Johnson's wife answered the door and admitted them into the residence and explained that Johnson was sleeping. (Tr. 874) At Knight's request, he was awakened and there then ensued a conversation between Brown, Knight, and Johnson in the living room of the Defendant's abode. (Tr. 890) The subject of a purchase of narcotics was first raised by Knight to which Johnson demurred. (Tr. 894-895) There

* "Tr." refers to transcript of trial pages.

followed a further discussion in which Knight advised Johnson of Brown's cover story and desire to purchase heroin. (Tr. 906-930) This entire conversation was recorded by means of a tape recorder strapped to Brown's chest and subsequently transcribed, which transcript was introduced into evidence as People's Exhibit I.

At the termination of the conversation, arrangements were made for the three individuals to meet two days later at the Motown Lounge in Brooklyn. (Tr. 935-936) On February 23, 1973, Brown, Knight, and a female undercover agent, one Dorothy Richardson, posing as Brown's girlfriend, appeared at the Motown Lounge at approximatey 2:00 p.m. whereupon Johnson and Brown had a further conversation regarding the prospective purchase of narcotics, said conversation again being tape recorded and admitted into evidence. The transcript was introduced into evidence as People's Exhibit II.

During both conversations between Brown and Johnson (at Johnson's residence and the Motown Lounge), Johnson had continuously made references to a third individual from whom he would acquire the narcotics to sell to Brown at the request of Knight. The money passed from Brown to Johnson, at which time the Defendant left. (Tr. 986-992)

The activities of Johnson in leaving the Motown Lounge with Brown were photographed by a back-up team of New York City detectives. Johnson was next observed at an apartment at 950 Rutland Road, Brooklyn, New York which was leased to him and his wife and which was occupied by the Petitioner Hall (Hall). Photographs taken by the back-up team were admitted into evidence reflecting Johnson and Hall leaving said apartment with Hall carrying on her shoulder the knapsack bag which had contained the money delivered by Brown to Johnson. (Tr.

1748-1749) Subsequently, Johnson and Hall returned to the Motown Lounge whereupon undercover agent Richardson testified that she was advised by Johnson to "go down to the bar up the street". (Tr.1154) Undercover agent Richardson left the Motown Lounge and proceeded to the Centaur Bar where she saw Hall sitting at the bar with the green knapsack bag in her lap. (Tr. 1155) Undercover agent Richardson testified that she was handed said bag by Hall, the contents of which was heroin. (Tr. 1162) Richardson returned to the Motown Lounge and gave the bag to Brown. Brown, Richardson, Knight, Johnson and Hall remained at the Motown Lounge having drinks and subsequently Hall and Johnson left. (Tr. 1174)

No arrest was effectuated until March 13, 1973. On that day, a search, pursuant to warrant, was conducted at the apartment located at 950 Rutland Road, Brooklyn, New York. (Tr. 2122) No narcotics were found but a scale and a quantity of glucose was seized.

Johnson, who did not testify, based his defense upon the grounds of entrapment and being an agent of the buyer. His entrapment defense was based upon the language of the conversations of February 21 and 22, 1973 at his home which was claimed to be solicitation amounting to entrapment, and his defense of agency was based upon his constant references, in his conversations with Brown, to obtaining the narcotics, at the request of Brown and Knight, from a third person referred to as "the man".

Hall testified in her own defense to the effect that while Johnson gave her the green knapsack to deliver, she had no knowledge that there were any narcotics in the bag. (Tr. 2220-2229) Hall's defense was that she was an innocent intermediary.

Reasons for Granting the Writ

I. The Petitioners Were Deprived of a Fair Trial by the Prejudicial Conduct and Constant Interference of the Trial Court, Thereby Denying the Petitioners Due Process of Law.

The undue participation of the trial court in its questioning of witnesses, its repetition of testimony damaging to the Petitioners, its interference with the cross-examination by Petitioners' counsels, its statements to the jury, and its prejudicial remarks throughout the course of the trial deprived the Petitioners of the fair and impartial trial to which they were entitled by due process of law.

Understandably, it is impossible for the Petitioners to recreate herein the demeanor and judicial influence that pervaded the atmosphere of the trial of this very serious charge. No rhetoric or abridgment is as persuasive as the reading of the trial record itself. Restricted as we are, however, the following represents only a sample of the "active participation" of the court in this trial.*

At the very outset of the proceedings, in addressing the jury pool, the court offered its own brand of hearsay evidence as "orientation":

> . . . police received tips from people that say so and so on the street corner is selling narcotics, and that so and so is selling nacotics in a house in such and such an apartment. (Tr 42a)

When defense counsel objected to the court's extensive conduct of the jury voir dire, respectfully suggesting that such questioning was best left to the prosecutor, the court responded:

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* In the original appellate briefs submitted to the Appellate Division, Supreme Court of New York, Second Department, Petitioners specified ninety (90) instances of alleged prejudicial interference by the trial court into the trial proceedings. In order, however, to conform with this Honorable Court's desire for conciseness, Petitioners have resisted the temptation to reproduce verbatim all such instances, without intending to undermine the issue.

> I am being paid a salary, I have to do something in this case. (Tr. 84)

And so the Court served notice of its involvement, and set the style of the trial with the following as it interrupted defense counsel's voir dire of the jury:

> A person who is charged with a crime is not looking for a fair trial, he just wants to be set free, whether it's a fair trial or not. (Tr. 103)

The style continued throughout the trial:

> The Court: On cross-examination lawyers have a right to twist testimony any way they want. (Tr. 1849)

The Court frequently "objected" where no objection was offered by the prosecutor. The following is not only an interruption of defense counsel's examination, but casts aspersions on the integrity of the defense cause:

> [Defense Counsel]: Most respectfully, don't you think, Your Honor, that your question would be more properly asked by the District Attorney in re-direct?
>
> The Court: There is a responsibility upon the court who has to see to it that even handed justice is dispensed with . . . . (Tr. 1856)

The Court constantly played an active roll in presenting evidence:

> The Court: This trial has to end some day, and it never will if I don't ask questions. (Tr. 1089)

And, most respectfully, in what a full reading of the transcript of trial will disclose as a gross understatement, the court interrupted defense counsel:

> The Court: I would like to get a word or two in this trial.
>
> [Defense Counsel]: I think you are succeeding Judge.
>
> The Court: I think so. It is necessary to keep the trial moving along at a proper momentum to see that the relevant testimony gets before the jury.

The zealousness of the court is starkly reflected in the following interruption of defense counsel's cross-examination:

> [Defense Counsel]: I am asking that question. (Tr. 1693)
>
> The Court: I don't care what you are asking. I am asking a question.
>
> . . . .
>
> [Defense Counsel]: Objection to Your Honor's interrupting my cross-examination and asking a different question.
>
> The Court: Overruled. Now don't interfere again.
>
> [Defense Counsel]: I have got to make my record.
>
> The Court: You shall not.
>
> [Defense Counsel]: I will make my record.
>
> The Court: [addressing defense counsel] You will do as I direct you to do. Take a seat please. Take a seat immediately and don't say another word. (Tr. 1694)

In instances too frequent to recite, the court took over the questions of the District Attorney's witnesses to elicit

testimony unfavorable to the Petitioners. Tr. 771-783, 907-909, 912-914, 934-935, 939, 944-945, 974-983, 986-988, 1012-1015, 1024, 1038-1043, 1061-1062, 1064-1067, 1075, 1086, 1130, 1147-1149, 1151-1156, 1160-1162, 1164-1166, 1175-1179, 1187, 1258-1259, 1260-1262, 1274-1275, 1282-1283, 1303, 1305, 1313-1316, 1322-1323, 1327, 1329-1330, 1344-1349, 1351-1356, 1576, 1744-1745, 1750-1751, 1757b, 1757s, 1771-1779, 1835-1836, 2075-2085. And the court repeated the testimony of the District Attorney's witnesses thereby strengthening and emphasizing their testimony. Tr. 902-903, 1061-1062, 1151-1152, 1260-1261, 1282-1283, 1425, 1531, 1565-1566, 1833.

The court repeatedly interrupted the defense cross-examination, breaking the stride thereof, and asking questions of the witnesses, which if proper, were for the District Attorney on re-direct. Tr. 1475-1477, 1480-1481, 1502, 1505, 1562-1563, 1565-1566, 1693-1695, 1840-1845, 1847, 1853-1856, 1874-1875, 1985-1986, 1995, 2133-2134, 2161-2162.

The partiality of the court towards the prosecution, regardless of the court's frequent disclaimers is shown in the court's comment when the undercover agent Brown who made the purchase of the drugs from Johnson testified as to a conversation with Johnson relative to Johnson's alleged concern that too much talk on the street might get him into trouble:

> Witness: He said, "you get good stuff, but I don't want to hear about it." He stated that people been talking down there, they don't mean any harm, but the wrong man would hear.
>
> The Court: You were the wrong man to hear.
>
> (Jury laughs)
>
> [Defense Counsel]: Respectfully excepted Your Honor.
>
> The Court: Ladies and gentlemen, strike out what I just said from the record. It has nothing to do with this case. Disregard what I said.

The court could not strike this jest from the minds of the jury, to whom, it is respectfully submitted, it appeared a "truth oft spoken in jest." On cross-examination of Brown, the court interrupted defense counsel, observing that the witness' testimony was not contradictory to prior testimony of the witness. Of course, this is clearly a jury function. Indeed the court came to recognize this, and so instructed the jury. (Tr. 1505) But, nevertheless it is representative of the court's attitude.

The court endorsed the summation of the prosecutor. During the prosecutor's summation, defense counsel objected regarding an unfair inference being drawn by the prosecutor relative to the Petitioner Hall "living" with another man. The court aggravated the error by stating: "a woman who cares so little about morals, does she worry about lying." (Tr. 2510). And then the court labelled the District Attorney's argument as "perfectly reasonable." (Tr. 2512)

A judge's participation during trial, whether it takes the form of interrogating witnesses, addressing counsel or some other conduct, must never reach the point at which it appears clear to the jury that the court believes the accused is guilty. *United States* v. *Nazzaro*, 472 F.2d 302 (2nd Cir. 1973). Even where a judge's interjections are not motivated by a partisan purpose, he must not permit himself even the appearance of such an inference. An appearance of impartiality and judicious detachment must prevail at all times. *United States* v. *Curcio*, 279 F.2d 681, 682 (C.A. 2 1960). A Judge ought never to assume the role of a prosecuting attorney and thus lend the weight of his great influence to the side of the prosecution. *Hunter* v. *United States*, 62 F.2d 217 (5th Cir. 1932). Indeed, it is too much to expect of human nature that a judge can actively and vigorously aid in the prosecution

and at the same time appear to the layman on the jury to be impartial. *United States* v. *Hooker*, 483, F.2d 359 (5th Cir. 1973). This court long ago noted "under any system of jury trials, the influence of the trial judge on the jury is necessarily and properly a great weight, and that his slightest word or intimation is received with deference and may prove controlling." *Star* v. *United States*, 153 U.S. 614, 626 (1894).

The Petitioners respectfully submit that an examination of the mosaic of the trial court's conduct in this case, when considered individually or taken as a whole, establishes such improper conduct by the trial court as to have denied the Petitioners their due process right to a fair trial. *United States* v. *Guglielmini*, 384 F.2d 602, 605 (2nd Cir. 1967).

The right to fair trial advanced here goes directly to the integrity of the truth finding process and may not be considered harmless error. *Chapman* v. *California*, 386 U.S. 18; *Harrington* v. *California*, 395 U.S. 250.

II. The Petitioners Were Denied Due Process of Law and Their Right of Confrontation by the Trial Court's Allowance into Evidence of Out-of-Court Statements Highly Prejudicial to the Petitioners and Erroneously Limited to the "State of Mind of the Police" on a Defense of Entrapment.

During the direct examination of the undercover agent Brown, Brown was allowed to testify that in July of 1972, he had had a conversation with two *other Police Officers* in the narcotics division regarding Johnson. Brown testified that Patrolman Matera and Sgt. Martinez "told me that they had complaints that the defendant seated over there, Jessie Johnson, was a large-scale narcotics dealer in the Brooklyn area. (Tr. 790) The triple "hearsay"

aspects of this testimony is obvious. Defense counsel objected and took exception, whereupon the *court* asked the witness:

> The Court: A large-scale narcotics dealer. Did they tell you anything else?
>
> Witness: They told me that he had a person that might possible be able to introduce me to him and to members of his organization.

The court personally pursued this prejudicial questioning. (Tr. 790-791) Additionally, the witness was allowed to testify as to a conversation in July of 1972 which he had with an alleged confidential informant Knight. Over objection, Brown, testified that Knight told him that "he worked for Johnson almost ten years" and would, therefore be able to introduce Brown to Johnson. (Tr. 814) Brown was also allowed to testify that he purchased narcotics from people "who knew defendant Jessie Johnson." (Tr. 870)

During the testimony of Sergeant Martinez, the *court* itself asked the witness:

> The Court: Did Pete Knight, the confidential informant, tell you something which would cause you to believe that the defendant, Jessie Johnson, was involved in some sort of a narcotics activity? (Tr. 1783)
>
> Witness: Yes, he did. (Tr. 1783)

On re-direct examination, Martinez was asked what the informant Knight had told him regarding the Petitioner, Johnson. Again, over objection, the witness was allowed to answer:

Witness: He told us that he had worked for the defendant Johnson for approximately ten years and that Knight himself received a supply of heroin from the defendant Johnson. (Tr. 2003)

The informant Knight did not testify, but testimony of his reliability was permitted.

If the above testimony was admitted for the purpose of proving the truth of the matter asserted, it would be the rankest prejudicial hearsay. The Petitioner respectfully submits that its affect was just that, rank hearsay. It clearly had to have the affect of prejudicing the jury as to the truth of the matters asserted. *Bruton* v. *United States*, 391 U.S. 123.

The court admitted the testimony, however, on the issue of the "state of mind of the police" as regards a "good faith" investigation, which the trial court held was admissible to counter the defense of entrapment. This court has recently ruled that the essence of the entrapment defense is the predisposition of the accused, not over-zealous police conduct. The issue is the state of mind of the accused, not that of the police. *United States* v. *Russell*, 411 U.S. 423. In *Russell* this court said that the consideration of police zealousness "unnecessarily introduces an unmanageable subjective standard which is contrary to the holdings of the court in Sorrells and Sherman." *Id.* at 435. The defense of entrapment in New York is "based upon the federal standards enunciated in *Sorrells* v. *United States*, 287 U.S. 435, and *Sherman* v. *United States*, 356 U.S. 369." New York P.L. §35.40, Practice Commentary, Denzer and McQuillan.

Even if the testimony had been offered on the predisposition of the defendant, it was inadmissible. While it has been held that the commission of prior-like crimes is admissible to prove predisposition, *People* v. *Calvano*,

30 N.Y. 2d 199; *Commonwealth v. Miller*, 72 Mass. Adv. Sheets 839, the evidence of the prior crimes must come from a legitimately admissible source establishing the conviction. Where the defendant's "reputation" for the commission of similar crimes is offered, it must be competent proof of reputation. The evidence offered above clearly does not so qualify.

Furthermore, in those instances where the source of evidence is competent, its prejudicial aspects must be considered.

> Collateral evidence of this nature must always undergo the scrutiny and preliminary evaluation of the trial judge who is charged with the responsibility of excluding it when its relevance to disposition is remote or its probative affect so doubtful as to be outweighed by the prejudice its reception will engender.

People v. *Calvano, supra* at 436.

In the instant case, Johnson's defense of entrapment was used against him so as to permit incompetent evidence of out-of-court statements which clearly established in the jury's mind that he was a *heavy dealer* in narcotics in their community. This pervertion of the defense of entrapment irreparably prejudiced the Petitioners and denied them due process of law and their right of confrontation.

III. New York Law Which Shifts the Burden of Persuasion on the Issue of Entrapment to the Criminal Defendant Violates Due Process of Law.

New York Penal Law, §35.40 provides that the defense of entrapment is an "affirmative defense," and New York Penal Law, §25.00 (2) provides that the defendant has

"the burden of establishing such defense by a preponderance of the evidence."

The Trial Judge gave an instruction pursuant to the above, imposing the burden of persuasion upon the Petitioner Johnson. Exceptions to this aspect of the charge were saved by both Petitioners. (Tr. 2672-2673)

In *People* v. *Laietta*, 30 N.Y. 2d 68 (1972) *cert. den.* 407 U.S. 923, the Court of Appeals upheld the constitutionality of this entrapment defense against constitutional due process attack, distinguishing entrapment from other defenses (e.g., alibi, *Stump* v. *Bennett*, 398 F.2d 111 (C.A. 8) *cert. den.* 393 U.S. 1001, holding a violation of due process to place burden of persuasion on defendant) as not going to an essential element of crime.

The Court of Appeals thus avoided the import of *In Re Winship*, 397 U.S. 358 (1970), that "the Due Process clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." *Id.* at 364.

The Petitioner respectfully submits that the defense of entrapment does go to *the* essential element of the true crime (malum in se), the *mens rea*, and therefore the facts necessary to show the *mens rea* must be proved beyond a reasonable doubt. *In Re Winship, supra.*

The opinions of this Court go to a recognition that the defense of entrapment addresses the *mens rea* element of the crime. In *Sorrells* v. *United States*, 287 U.S. 435, 431, this Court said that entrapment exists when the conduct of the accused is "the product of the *creative activity*" of Government officials. *Id.* at 431 (emphasis added), and when such official "implants in the mind of an innocent person the disposition to commit the alleged offense...". *Id.* at 372. In *United States* v. *Russell, supra*, this Court ruled that the defense of entrapment was related directly

to the mind of the accused in holding that the basic principle of the defense is the predisposition of the defendant, his state of mind, and not "over-zealous law enforcement." *Id.* at 436 (emphasis added). And in *Russell*, this Court reiterated that "the defense of entrapment comes into play" when the Government "implants the *criminal design* in the mind of the defendant . . ." *Id.* at 436 (emphasis added).

And Professor Perkins, in his well-known work on criminal law, Perkins, Criminal Law (2d ed. 1969), after stating that entrapment is "implanting criminal ideas in innocent minds," *Id.* at p. 1031, continues that the "determinant is the point of origin of the *criminal intent*; when it starts in the mind of the officer . . . no conviction can be had, but entrapment is not established if the evidence shows that the intent to commit the crime originated in the mind of the defendant." *Id.* at 1033. (Emphasis added)

When speaking of so critical an element as criminal intent to the rationale of criminal law, and so fundamental a principle, as the requirement of burden of proof beyond a reasonable doubt upon the state, it is not sufficient to make an intellectual distinction that after "implantation," the defendant's mind contains "criminal intent." The reality remains that the evil design was that of the implanter and not that of the defendant actor. The burden of persuasion upon the state should not, and cannot be, relieved.

As Professor McCormick says so simply in this regard:

> As to all . . . claims for exoneration, their truth goes in final analysis to the guilt, to the rightness of punishing the accused. Thus, it seems inconsistent to demand as to some elements of guilt . . . that the jury be convinced beyond a reasonable doubt, and as

> to others . . . the jury may convict though they have such doubt. Accordingly, . . . at the close of the evidence the jury must be told that if they have a reasonable doubt of the element thus raised they must acquit.

McCormick, Evidence (2nd ed. 1972) p. 802.

The Petitioners respectfully submit that the defense of entrapment in reality goes to the criminal intent of the criminal accused, and, as such, is an essential element of the offense and within the requirements of *In Re Winship, supra.*

IV. The Petitioner Hall Was Denied Due Process of Law by Reason of Having Been Tried Jointly With the Petitioner Johnson, Who Raised a Defense of Entrapment.

The Petitioners Hall and Johnson were charged by separate indictments. Prior to trial, the District Attorney moved, and was granted a consolidation of the indictments, and the Petitioners were tried jointly. Hall objected to such consolidation (R. 84a-95a)* and pressed her claim on appeal.

The defenses of the Petitioners were vastly different. Johnson made a defense of entrapment and Hall maintained a defense of an innocent intermediary. The defense of entrapment is obviously inconsistent with lack of knowledgeable involvement, and has been said to imply guilt, cf. *United States* v. *Rodriguez,* 433 F.2d 760 (C.A.-1, 1970), *cert. den.* 401 U.S. 943, the very antithesis of Hall's defense. Such a joint trial inherently denied the Petitioner Hall of a fair trial and therefore due process of law. *People* v. *Freed,* — N.Y. 2d —, App. Div. S. Ct. (1975); cf. *Bruton* v. *United States,* 391 U.S. 123.

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* "R." refers to Record on Appeal. Note the transcript of trial is bound into the Record on Appeal.

V. The Trial Court Violated Petitioner Hall's Fifth Amendment Privilege Not To Testify and Due Process of Law as to Both Petitioners by Permitting the Petitioner Hall To Be Confronted on Cross-Examination With Evidence Which the Court Had Previously Ruled To Be Irrelevant and Highly Prejudicial.

A search, pursuant to a warrant, was conducted on March 12, 1973, of an apartment leased to Johnson and inhabited by Hall. Pursuant to said search, various items were seized including a scale and a quantity of glucose. It was the theory of the prosecution that these items were relevant in that they were instruments utilized in weighing and "cutting" illegally possessed narcotics.

The single issue of liability as regards Hall concerned whether she knew on February 23, 1973, the date of the alleged offenses, that the knapsack of which she was the courier, contained heroin. Timely objection was made at trial when evidence of the search and the items were offered. The defense argued that the evidence was so remote as to have no relevance as to Johnson, and no relevance as to Hall on the question of Hall's knowledge as to the contents of the knapsack on February 23, 1973. In sustaining this objection, the court stated:

> Mr. District Attorney, the admissibility of this testimony is so doubtful in my mind and it would be so unquestionably prejudicial, that I am going to sustain the objection to its introduction. (Tr. 2119)

As previously noted, the Petitioner Hall elected to testify in her own defense. She did not testify on direct about any of these items or about the contents of her apartment. While having previously excluded evidence of the scale and glucose as irrelevant to Hall's knowledge of the contents

of the knapsack and "unquestionably prejudicial", the court ruled that it would permit the District Attorney to question Hall on cross-examination on the fact of the presence of the scale and glucose in her apartment at the time of the search. The court ruled that such questions went to her* "credibility", but that the prosecutor would be bound by her answer.

To compound the error, the *court* recognizing the danger of permitting the questions, took upon *itself* the task of putting the questions to the witness, while holding a copy of the search inventory in its hand. (Tr. 2339)

> The Court: On March 12, 1973, in apartment 406 of 950 Rudland Road, was there, to your knowledge, in that apartment so (sic) glucose, a scale, a plastic bag with white powder in it, and tin foil with powder?

Following exceptions by counsel, the court continued:

> The Court: Did you know that was there?
>
> Witness: Yes. Because the glucose is sugar supplement. You don't have to use sugar, and I use that in my milk.
>
> The Court: Did you have a plastic bag with powder in it?
>
> Witness: Flour.
>
> The Court: Flour?
>
> Witness: Yes.
>
> The Court: Did you have a scale?
>
> Witness: Yes, it was a scale in there. It was there when we first moved in the apartment. I have never used it.
>
> The Court: [Directing the District Attorney] Now go to something else.

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* Petitioner Johnson maintains that as this was a joint trial, and as this apartment was rented to him, this evidence prejudiced him regardless of the court's limiting instruction.

The District Attorney then offered to produce expert testimony that glucose is a cutting material for heroin. Properly, the court excluded such testimony "because that doesn't go to the question as to whether she knew that on February 23, People's Exhibit 3 [green knapsack], contained narcotics." This ruling points out the inconsistency of the court's reasoning and the prejudice which it permitted to be visited upon the Petitioners. If the fact that glucose may be used as a cutting material for heroin does not go to the question of Hall's knowledge of the contents of the knapsack on February 23, 1973, it obviously cannot be said that the fact that glucose was found in the apartment on March 12, 1973 goes to the issue of her knowledge, and her credibility of her denial thereof.

Petitioners respectfully submit that if this "prejudicial" evidence was irrelevant on the issue of Hall's knowledge, it must be equally irrelevant on the issue of her credibility of denial of knowledge. It must be taken that among the matters considered by Hall in deciding to testify was the proper ruling of the court to exclude evidence of the seized items. To permit the Petitioner to be "impeached" by evidence held irrelevant to the issue of her knowledge is not only a patent violation of the essential idea of relevance, but was a clear reversal of a prior ruling upon which the Petitioner had relied in deciding to waive her Fifth Amendment privilege not to testify. Cf. *Johnson* v. *U. S.*, 318 U.S. 189 (1943)

In *Walder* v. *United States*, 347 U.S. 62 this court permitted the defendant-witness to be impeached by evidence obtained as a result of an illegal search and seizure. In *Harris* v. *New York*, 401 U.S. 222, this court permitted the defendant-witness to be impeached by a *Miranda* violative statement.

In each of these cases, however, the impeaching evidence

was *relevant* to the issue of the defendant's credibility. In this case, the Petitioner Hall waived her Fifth Amendment privilege and was then confronted with irrelevant evidence, which she had every expectation could not be used for *any* purpose. The use of that evidence against the Petitioner Hall violated her Fifth Amendment privilege and due process of law. As a result of the court's erroneous ruling permitting this confrontation, it cannot be said that the Petitioner Hall intelligently waived her privilege not to testify. *Johnson* v. *Zerbst*, 304 U.S. 458, and that the evidence in the context of this joint trial was prejudicial as to both petitioners. Cf. *Bruton* v. *U. S.*, *supra*.

Conclusion

For the several reasons set forth above, petitioners urgently pray that a writ of certiorari issue from this Court to review the judgment of the Supreme Court of the State of New York, Second Judicial Department.

Respectfully submitted,

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APPENDIX A

At a Term of the Appellate Division of the Supreme Court of the State of New York, Second Judicial Department, held in Kings County on October 15, 1974.

HON. HENRY J. LATHAM, Acting Presiding Justice,
Associate Justices
HON. MARCUS G. CHRIST
HON. ARTHUR D. BRENNAN
HON. A. DAVID BENJAMIN
HON. FRED J. MUNDER

THE PEOPLE OF THE STATE OF NEW YORK,
RESPONDENT,
v.
JESSIE JOHNSON AND CYNTHIA HALL,
APPELLANTS.

ORDER ON APPEALS FROM JUDGMENTS OF CONVICTION.

In the above entitled action, the above named Jessie Johnson and Cynthia Hall, defendants in this action, having appealed to this court from two judgments (one as to each defendant) of the Supreme Court, King County, both rendered October 16, 1973; and the said appeals having been argued by Gerald Alch, Esq., of counsel for the appellant Johnson, argued by Harold L. Levy, Esq., of counsel for the appellant Hall and argued by Roger Bennet Adler, Esq., of counsel for the respondent, and due deliberation having been had thereon; and upon this court's decision slip heretofore filed and made a part hereof, it is

ORDERED that the two judgments appealed from are hereby unanimously affirmed.

Enter:

IRVING N. SELKIN
Clerk of the Appellate Division.

APPENDIX B

STATE OF NEW YORK
COURT OF APPEALS

THE PEOPLE OF THE STATE OF NEW YORK,
against
JESSIE JOHNSON

Before: HON. SOL WACHTLER, Associate Judge

CERTIFICATE DENYING LEAVE

I, SOL WACHTLER, Associate Judge of the Court of Appeals of the State of New York, do hereby certify that, upon application timely made by the above-named appellant for a certificate pursuant to CPL 460.20 and upon the record and proceedings herein,* there is no question of law presented which ought to be reviewed by the Court of Appeals and permission to appeal is hereby denied.

Dated at Mineola, New York
February 4, 1975

(s) SOL WACHTLER
Associate Judge

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* Description of Order: Judgment of Supreme Court, Kings County, dated October 16, 1973; affirmed by Appellate Division, Second Department, October 15, 1974.

APPENDIX C

STATE OF NEW YORK
COURT OF APPEALS

THE PEOPLE OF THE STATE OF NEW YORK,
against
CYNTHIA HALL

Before: HON. SOL WACHTLER, Associate Judge

CERTIFICATE DENYING LEAVE

I, SOL WACHTLER, Associate Judge of the Court of Appeals of the State of New York, do hereby certify that, upon application timely made by the above-named appellant for a certificate pursuant to CPL 460.20 and upon the record and proceedings herein,* there is no question of law presented which ought to be reviewed by the Court of Appeals and permission to appeal is hereby denied.

Dated at Mineola, New York
February 4, 1975

(s) SOL WACHTLER
Associate Judge

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* Description of Order: Judgment of Supreme Court, Kings County, dated October 16, 1973; affirmed by Appellate Division, Second Department, October 15, 1974.